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No. 99-626

In the Supreme Court of the United States

GERALD GILLESPIE, PETITIONER

v.

CITY OF INDIANAPOLIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress amended the Gun Control Act of 1968 to bar persons convicted of a misdemeanor crime of domestic violence from possessing a firearm that has traveled in interstate commerce. See 18 U.S.C. 922(g)(9) (Supp. IV 1998). The questions presented are as follows:

1. Whether the application of Section 922(g)(9) to state and local employees who would otherwise carry firearms in the performance of their duties violates the Tenth Amendment.

2. Whether Congress acted within its Commerce Clause powers in enacting Section 922(g)(9).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 185 F.3d 693. The opinion of the district court (Pet. App. 37-77) is reported at 13 F. Supp. 2d 811.

JURISDICTION

The court of appeals entered its judgment on July 9, 1999. The petition for a writ of certiorari was filed on October 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1216, prohibits specified classes of persons from possessing firearms "in or affecting commerce." 18 U.S.C. 922(g) (1994 & Supp. IV 1998). Those classes include, *inter alia*, felons, fugitives, illegal aliens, and persons committed to a mental institution. See 18 U.S.C. 922(g)(1)-(8) (1994 & Supp. IV 1998). The prohibitions contained in Section 922(g)(1)-(8) are inapplicable to firearms "issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof." 18 U.S.C. 925(a)(1) (Supp. IV 1998).

In 1996, Congress amended the Gun Control Act to bar the possession of firearms by any person convicted of a misdemeanor crime of domestic violence. See 18 U.S.C. 922(g)(9) (Supp. IV 1998).[1] Unlike the other prohibitions set forth in Section 922(g), Section 922(g)(9) applies to firearms issued by federal, state, and local governments. 18 U.S.C. 925(a)(1) (Supp. IV 1998).

2. Petitioner was employed as a police officer by the Indianapolis Police Department. Pet. App. 2. In October 1995, petitioner pleaded guilty to a misdemeanor charge of battery involving his former wife. *Id.* at 4. It is undisputed that this offense constitutes a "misdemeanor crime of domestic violence" for purposes of Section 922(g)(9). *Id.* at 4-5.

After the enactment of Section 922(g), federal law prohibited petitioner from possessing a firearm in or affecting commerce. Based on Section 922(g)(9), the

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[1] Section 922(g)(9) does not apply to an individual whose conviction has been set aside or expunged, or who has been pardoned or has had his civil rights restored. See 18 U.S.C. 921(a)(33)(B)(ii) (Supp. IV 1998).

Indianapolis Police Department concluded that petitioner could no longer carry a firearm. Pet. App. 5. Because Department policy requires that every police officer be trained and equipped to possess and use a firearm, the Department further concluded that petitioner is no longer eligible to serve as a police officer. Accordingly, it notified petitioner that he would be terminated from the Department's employ. *Ibid.*

3. Petitioner then filed suit against respondent City of Indianapolis, challenging the Department's termination decision and seeking to have Section 922(g)(9) declared unconstitutional. Pet. App. 2. The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the statute. Pet. App. 39, 43. The district court dismissed petitioner's complaint, rejecting each of his constitutional arguments. *Id.* at 51-77.

4. The court of appeals affirmed. Pet. App. 1-36.

a. The court of appeals held that Section 922(g) constitutes a permissible exercise of Congress's authority under the Commerce Clause. The court held that the inclusion of a jurisdictional element, limiting the statute's application to firearms "in or affecting commerce," was sufficient to overcome petitioner's Commerce Clause challenge. Pet. App. 18-21. The court held that the statute does not require proof "that a given firearm or a particular individual's possession of that firearm had a substantial impact on commerce." *Id.* at 21. Rather, the court explained, "[a]ll that need be shown in the individual case * * * was that the firearm in question had previously moved across state lines." *Ibid.* Petitioner made "no claim that the weapon issued to him by the Indianapolis Police Department might never have moved across state lines." *Id.* at 22. The court concluded that

> in acknowledging that the gun at the least has this minimal tie to interstate commerce, [petitioner] has conceded away the only basis he might have for a Commerce Clause challenge to the statute. Without question, Congress has the power to regulate the interstate trade in firearms. Pursuant to that authority, it may act to stem the flow of guns to those whom it rationally believes may use them irresponsibly, including those whose convictions for domestic violence offenses reflect a propensity to inflict bodily harm upon others.

Ibid.

b. The court of appeals also rejected petitioner's contention that the Tenth Amendment bars the application of Section 922(g)(9) to persons, like himself, who have been authorized by a state or local government to carry firearms in the performance of official duties. Although holding that petitioner had standing to raise the argument (Pet. App. 9-17), the court concluded that Congress had not intruded into an area of authority reserved to the States by the Tenth Amendment (*id.* at 22-28). The court of appeals explained that Congress has long barred felons from possessing firearms in or affecting commerce, and this Court has "not view[ed] the proscription as an unconstitutional intrusion upon state sovereignty." *Id.* at 23-24. The court held that "[t]he recent inclusion of some misdemeanants raises no new concerns" because "[t]he statute simply employs a state conviction as the predicate for a prohibition to engage in an activity over which Congress has broad authority." *Id.* at 24.

The court found it constitutionally insignificant that the firearms ban includes individuals who are employed in state and local law enforcement, or who would

otherwise be qualified to serve in state militias. Pet. App. 24-25. The court explained:

> [S]ection 922(g)(9) is a criminal statute of general application that regulates individual behavior * * *. It singles out no one by occupation or affiliation with state or local government. To the extent that the statute renders individuals like [petitioner] ineligible for employment in state and local law enforcement and ineligible to serve in a state militia, it does so incidentally and as a result of a valid congressional exercise of the commerce power.

Id. at 25.

The court also rejected petitioner's argument that Section 922(g)(9) violates the Tenth Amendment "by imposing a federal firearms disability that most States themselves have not chosen to impose." Pet. App. 26-27. The court explained that it "discern[ed] no respect in which the statute commandeers state governments or their officers." *Id.* at 27. The court noted that the statute "is not directed at States or state officials." *Ibid.* Rather, Section 922(g)(9) is "a criminal law of general application; as such, it regulates the behavior of individuals as individuals." *Ibid.*

c. The court of appeals also rejected petitioner's equal protection claim. Pet. App. 28-31. Petitioner contended that Section 922(g)(9) is subject to strict scrutiny because it implicates his asserted Second Amendment right "to keep and bear Arms." *Id.* at 28. The court held that Section 922(g)(9) does not impair any fundamental right, that it is consequently subject to review under a rational-basis standard, and that it was not irrational for Congress to impose a firearms ban on domestic violence misdemeanants but not on persons

who have been convicted of other misdemeanors. See *id.* at 29-30. The court also rejected petitioner's contention "that the firearms ban may be irrational to the extent it reaches individuals like [petitioner], who carry firearms in the public interest." *Id.* at 30. The court explained:

> That someone previously convicted of engaging in domestic violence may possess a firearm for public rather than private purposes does not negate the possibility that he might use that gun against someone in his household. Congress could, therefore, reasonably conclude that the reasons for an individual carrying a gun are irrelevant and that it is the individual's criminal history which should determine his right to do so.

Id. at 30-31.

d. The court of appeals concluded that *United States* v. *Miller*, 307 U.S. 174 (1939), and its progeny "confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia." Pet. App. 32-33. The court held that petitioner had failed to demonstrate a "reasonable relationship" between his own inability to carry a firearm and "the preservation or efficiency of a well regulated militia." *Id.* at 35 (quoting *Miller*, 307 U.S. at 178). The court noted that petitioner did "not argue (and we do not believe under any plausible set of facts that he could) that the viability and efficacy of state militias will be undermined by prohibiting those convicted of perpetrating domestic violence from possessing weapons in or affecting interstate commerce." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. In *Fraternal Order of Police* v. *United States*, 120 S. Ct. 324 (1999), this Court recently denied a petition for a writ of certiorari raising essentially the same arguments as are advanced by petitioner.[2] Further review of petitioner's claims is therefore not warranted.

1. Every court of appeals that has considered the question has held that Section 922(g)(9)'s application to state and local employees does not violate the Tenth Amendment. See Pet. App. 15-17; *Fraternal Order of Police* v. *United States*, 173 F.3d 898 (D.C. Cir. 1999), cert. denied, 120 S. Ct. 324 (1999); *Hiley* v. *Barrett*, 155 F.3d 1276 (11th Cir. 1998) (affirming and adopting *National Ass'n of Gov't Employees, Inc.* v. *Barrett*, 968 F. Supp. 1564, 1575-1576 (N.D. Ga. 1997)). See also *United States* v. *Meade*, 175 F.3d 215 (1st Cir. 1999) (rejecting Tenth Amendment challenge to 18 U.S.C. 922(g)(8) (1994 & Supp. IV 1998)). That conclusion is correct and consistent with this Court's precedents. In *New York* v. *United States*, 505 U.S. 144 (1992), the Court emphasized the longstanding distinction between laws passed by Congress "requiring or prohibiting certain acts," and laws that "directly * * * compel the States to require or prohibit those acts." *Id.* at 166; see also *South Carolina* v. *Baker*, 485 U.S. 505, 514-515 (1988). Section 922(g)(9) does not compel the States to

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[2] Petitioner filed a motion to consolidate his petition with the petition filed in *Fraternal Order of Police* on the ground that the petitions raised the same issues. This Court denied the motion as moot because it had already denied the *Fraternal Order of Police* petition.

enact regulations, nor does it commandeer state officials to implement a federal program. Rather, Section 922(g)(9) regulates the behavior of individuals, making it a federal crime—enforceable by federal authorities and prosecutable in the federal courts—for a category of persons deemed unsuitable by Congress to possess or receive firearms in or affecting commerce.

Petitioner contends (Pet. 9-13) that Section 922(g)(9) improperly precludes state and local governments from determining that particular domestic violence misdemeanants should be permitted to carry firearms in the performance of official duties. As the D.C. Circuit recently explained in upholding Section 922(g), however, it is a common "side effect of federal prohibitions to impair offenders' fitness for service as a police officer." *Fraternal Order of Police*, 173 F.3d at 907. "Showing up for work at some spot other than a federal prison is a qualification for most state positions; federal incarceration intrudes inescapably." *Ibid.* Section 922(g)(9) "regulates individual behavior * * *. It singles out no one by occupation or affiliation with state or local government." Pet. App. 25. To the extent that the statute renders certain individuals ineligible for employment in state and local law enforcement and ineligible to serve in a state militia, "it does so incidentally." *Ibid.* Thus, "Congress has not superseded the criteria state and local governments employ to select those serving on their behalf; it has instead, in the exercise of its authority over interstate commerce, merely rendered some individuals unable, as a practical matter, to meet one of the criteria that state and local governments have themselves established." *Id.* at 25-26.[3]

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[3] Under 18 U.S.C. 922(d)(9) (Supp. IV 1998), one who knowingly transfers a firearm to a person previously convicted of a

2. The court of appeals correctly rejected petitioner's claim that Section 922(g)(9) should be subjected to strict scrutiny based upon its alleged interference with rights protected by the Second Amendment.[4] In

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domestic violence misdemeanor is subject to possible criminal penalties. See also 18 U.S.C. 924(a)(2) (establishing criminal penalties for any person who "knowingly violates" Section 922(d)). State supervisory officials who knowingly issue firearms to domestic violence misdemeanants would be covered by that provision. Section 922(d)(9) is not targeted at state officials, however, nor does it require state officials to assist in the enforcement or administration of federal law. Rather, it (like Section 922(g)(9)) simply encompasses state officials within the class of individuals subject to a generally applicable prohibition. Application of Section 922(d)(9) to state officials in that manner raises no genuine constitutional concern. Compare *Printz* v. *United States*, 521 U.S. 898, 913 (1997) (noting "the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law").

[4] Petitioner does not seek review of the court of appeals' holding that the statute passes rational basis scrutiny. See Pet. App. 30-31 & n.11. In any event, Section 922(g)(9) is an entirely reasonable means of removing firearms from likely scenes of domestic violence. Evidence before Congress showed that "the presence of a gun increases the likelihood that a woman will be killed threefold." 142 Cong. Rec. S11,227 (daily ed. Sept. 25, 1996) (Sen. Lautenberg). As the Seventh Circuit recently explained in *United States* v. *Lewitzke*, 176 F.3d 1022, 1026, cert. denied, 120 S. Ct. 267 (1999):

> The rationale for keeping guns out of the hands of those convicted of domestic violence crimes is eminently reasonable. Persons convicted of such offenses have, by definition, already employed violence against their domestic partners on one or more occasions. Congress could reasonably believe that such individuals may resort to violence again, and that in the event they do, access to a firearm would increase the risk that they

Lewis v. *United States*, 445 U.S. 55, 65 & n.8 (1980), this Court held that the federal bar on receipt and possession of firearms by convicted felons was subject only to rational basis review. The District of Columbia and Eighth Circuits, the only other courts of appeals that have addressed such a challenge to Section 922(g)(9), have also rejected it. *Fraternal Order of Police*, 173 F.3d at 905-906; *United States* v. *Smith*, 171 F.3d 617, 624 (8th Cir. 1999). See also *National Ass'n of Gov't Employees, Inc.* v. *Barrett*, 968 F.Supp. at 1573 n.11; *United States* v. *Boyd*, 52 F. Supp. 2d 1233, 1236 (D. Kan. 1999).

As the court of appeals explained here, "[t]he link that the [Second A]mendment draws between the ability 'to keep and bear Arms' and '[a] well regulated Militia' suggests that the right protected is limited, one that inures not to the individual but to the people collectively, its reach extending so far as is necessary to protect their common interest in protection by a militia." Pet. App. 31-32. Under *United States* v. *Miller*, 307 U.S. 174 (1939), the Second Amendment does not apply in the absence of "some reasonable relationship" between the regulation at issue and "the preservation or efficiency of a well regulated militia." *Id.* at 178. "*Miller* and its progeny * * * confirm that the Second

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might do grave harm, particularly to the members of their household who have fallen victim to their violent acts before.

Moreover, as the District of Columbia Circuit explained in upholding the statute, it was not irrational for Congress to focus upon domestic violence misdemeanants. See *Fraternal Order of Police*, 173 F.3d at 903-904 ("it appears to us not unreasonable for Congress to believe that existing laws and practices adequately deal with the problem of issuance of official firearms to felons but not to domestic violence misdemeanants").

Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia." Pet. App. 32-33. See also *Lewis*, 445 U.S. at 65 n.8 (restriction on possession of firearms by felons does not "trench upon any constitutionally protected liberties"); *United States* v. *Rybar*, 103 F.3d 273, 285-286 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997); *San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1124-1125 & n.1 (9th Cir. 1996); *Hickman* v. *Block*, 81 F.3d 98, 101 (9th Cir.), cert. denied, 519 U.S. 912 (1996); *Love* v. *Pepersack*, 47 F.3d 120, 124 (4th Cir.), cert. denied, 516 U.S. 813 (1995); *United States* v. *Johnson*, 497 F.2d 548, 550 (4th Cir. 1974).

As the District of Columbia Circuit correctly recognized, Section 922(g)(9) "does not hinder the militia service of all police officers, only of domestic violence misdemeanants whose convictions have not been expunged, etc." *Fraternal Order of Police*, 173 F.3d at 906. Because petitioner "never indicates how [such] restrictions on the latter, relevant class would have a material impact on the militia," his Second Amendment claim fails. *Ibid.* See also Pet. App. 35 (rejecting Second Amendment challenge to Section 922(g)(9) because petitioner failed to demonstrate that "the viability and efficacy of state militias will be undermined by prohibiting those convicted of perpetrating domestic violence from possessing weapons in or affecting interstate commerce").

3. Petitioner contends (Pet. 19-21) that Section 922(g)(9) exceeds Congress's power under the Commerce Clause. As the District of Columbia Circuit noted in *Fraternal Order of Police*, all of the "numbered circuits" have rejected similar Commerce Clause challenges to the various restrictions on gun possession

imposed by 18 U.S.C. 922(g) (1994 & Supp. IV 1998). See *Fraternal Order of Police*, 173 F.3d at 907 & n.2 (citing cases from eleven courts of appeals). The restrictions are constitutional because Section 922(g) bars persons within the specified categories from possessing firearms "in or affecting commerce." 18 U.S.C. 922(g) (1994 & Supp. IV 1998). The statute thus contains a jurisdictional element that "ensure[s], through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 561 (1995); see also *Scarborough* v. *United States*, 431 U.S. 563, 564, 575 (1977) (felon's possession of a firearm satisfies the Omnibus Crime Control Act's "in commerce or affecting commerce" requirement if the gun has moved in interstate commerce at any time in the past).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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